Redlands Construction Co., Inc., and Felts Construction Co. *and* **International Union of Operating Engineers, Local No. 9.** Cases 27-CA-6484 and 27-CA-7324

December 2, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On December 9, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

In concluding that the Union represented a majority of the employees in the appropriate unit at all times material herein, we find it unnecessary to rely on *Carmichael Construction Company*, 258 NLRB 226 (1981), since the record affirmatively establishes such a majority by direct evidence, contrary to the finding of the Administrative Law Judge. Respondent's payroll records and the testimony of various witnesses indicate that Respondent's unit employees comprised a stable work force; that Ronald Mulnix was employed by Respondent from 1973 to 1981; that Ernest Mease was employed by Respondent for several periods including April 1975 until June 1979 and again from March 1980 until his discharge on April 30, 1981; and that in January 1979 the unit consisted of employees Mease, Mulnix, and Lemaster. Both Mease and Mulnix testified that they were members of the Union before they began their employment with Respondent and, as found by the Administrative Law Judge, both chose to terminate their employment with Respondent rather than forgo representation by the Union. Under these circumstances, the Union enjoyed an irrebuttable presumption of majority status for the duration of the applicable collective-bargaining agreement.[2] Thus, we find that as of January 1979 the Union did, in fact, enjoy majority support in the unit and that Respondent was obligated to bargain with the Union as the exclusive representative of the employees in the unit from that time forward. Accordingly, Respondent's failure to apply the terms of the applicable collective-bargaining agreement to Respondent Felts' unit employees in and after June 1979 violated Section 8(a)(5) of the Act as found by the Administrative Law Judge.

Moreover, we note that in April 1981, shortly before the expiration of the contract and Respondent's withdrawal of recognition from the Union, the testimony and wage records show that the unit consisted of employees Mease, Mulnix, Gagnon, and Thompson, and that all four were members of the Union prior to their employment with Respondent, thus once again affirmatively establishing an actual union majority.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Redlands Construction Co., Inc., and Felts Construction Co., Grand Junction, Colorado, a single employer, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Recognize and, on request, bargain with the Union as the representative of its employees in the appropriate unit over wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> "All equipment operators, mechanics and apprentices employed by Redlands Construction Co., Inc., and Felts Construction Co. at their Grand Junction, Colorado facility, but excluding laborers, office clerical employees, and all guards, professional employees and supervisors as defined in the National Labor Relations Act."

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Expunge from its files any reference to the discharge of Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson and notify them in writing that this has been done and that evidence of this unlawful constructive discharge will not be

[1] The Order and notice will be modified to include an affirmative order to recognize and bargain with the Union in accord with the remedy recommended by the Administrative Law Judge.

[2] *Hageman Underground Construction; Hageman Construction Company, Inc.; Hageman Engineering, Inc.*, 253 NLRB 60, 62 (1980).

used as a basis for future personnel actions against them."[3]

3. Substitute the attached notice for that of the Administrative Law Judge.

[3] See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT tell our employees that we will no longer continue to recognize International Union of Operating Engineers, Local No. 9, as the representative of our employees in the unit. The bargaining unit is:

All equipment operators, mechanics and apprentices employed by Redlands Construction Co., Inc., and Felts Construction Co. at our Grand Junction, Colorado facility, but excluding laborers, office clerical employees, and all guards, professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT withdraw recognition for the Union as representative of our employees in the unit.

WE WILL NOT fail and refuse to meet and bargain with the Union regarding terms and conditions of employment of employees in the unit and, if an agreement is reached, will embody such agreement in a new contract.

WE WILL NOT change employees' terms and conditions of employment unilaterally following expiration of the collective-bargaining agreement without affording the Union an opportunity to meet and bargain regarding terms and conditions of employment.

WE WILL NOT change employees' terms and conditions of employment during the contract's life, thereby breaching and repudiating the collective-bargaining contract without the approval and consent of the Union.

WE WILL NOT constructively discharge our employees by forcing them to quit rather than accept continued employment without representation by the Union or the enjoyment of negotiated terms and conditions of employment.

WE WILL NOT in any other manner violate the terms of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain with the Union as the representative of our employees in the appropriate unit over wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer employees Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson, immediate and full reinstatement to their former jobs or, if such jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired after the date of their discharges.

WE WILL make the above employees whole for loss of wages and other benefits caused by our discrimination against them by paying them an amount equal to what they would have earned from the date of their discharge to the date they are offered reinstatement, minus interim earnings, and with appropriate interest.

WE WILL make all employees whole who failed to receive contract terms and conditions of employment because of our failure to apply the contract to them by appropriate payments to employees and contractual funds of amounts sufficient to match what would have been paid had employees worked under the contract's terms with appropriate interest thereon.

WE WILL expunge from our files any reference to the discharges of Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson, and WE WILL notify them in writing that this has been done and that evidence of their unlawful constructive discharges will not be used as a basis for future personnel actions against them.

WE WILL continue to apply the contract's terms and conditions to unit employees until

we have negotiated in faith with the Union to a new agreement or have reached an impasse in bargaining.

REDLANDS CONSTRUCTION CO., INC., AND FELTS CONSTRUCTION CO.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter was heard on August 25 and 26, 1981, at Grand Junction, Colorado. The cases arose as follows: On December 21, 1979, International Union of Operating Engineers, Local No. 9 (the Union), filed a charge designated Case 27-CA-6484 against Redlands Construction Co., Inc.[1] (Respondent Redlands), and Felts Construction Co. (Respondent Felts and collectively with Respondent Redlands as Respondents) individually and jointly. On February 15, 1980, the Regional Director for Region 27 of the National Labor Relations Board (Regional Director and Board, respectively) issued a complaint and notice of hearing concerning Case 27-CA-6484. On May 21, 1981, the Union filed a charge designated Case 27-CA-7324 against Respondent Redlands. On June 23, 1981, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing consolidating the above-captioned cases.

The consolidated complaint alleges that Respondent Redlands repudiated its recognition of the Union as representative of certain of its employees, unilaterally changed working conditions of those employees, and discharged four employees thereby violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). It further alleges that Respondent Felts, as a single employer with Respondent Redlands, shares liability with Respondent Redlands for the unilateral changes in working conditions of employees. Respondents deny they have violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to submit post-hearing briefs.[2]

Upon the entire record herein,[3] including a brief submitted by the General Counsel and a brief and proposed findings and conclusions submitted by Respondent Redlands, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondents are Colorado corporations engaged as excavation contractors in Grand Junction, Colorado.[4] Respondent Redlands in the course of its business operations annually furnishes construction services valued in excess of $50,000 directly to enterprises located within the State, who in turn annually purchase and receive goods and materials valued in excess of $50,000 from sources outside of the State.

II. LABOR ORGANIZATION

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent Redlands Alone*

Background

Respondent Redlands until about 1979 operated as S & C Construction d/b/a Redlands Construction Co. Until about 1978, Respondent Redlands was solely owned by Mr. Joseph Cooksey and Mrs. Joanna Felts, brother and sister, on an equal basis. Thereafter Mrs. Felts acquired sole ownership. Mr. Patrick Felts is the son of Mrs. Joanna Felts.

1. Purported relationship between Respondent Redlands and the Union through April 1981

a. *Evidence*

The General Counsel and the Union introduced a series of contracts between Respondent Redlands and the Union covering the period 1970 through April 30, 1981.[5] The contracts covered employees who operated or maintained power equipment.[6]

There is vague but uncontradicted evidence that the contracts were followed by Respondent Redlands through 1978. There is no dispute that the terms of the 1978-81 contract were followed by Respondent Redlands who regularly made required contributions to contractually established fringe-benefit trusts. Consistent with the terms of this agreement the parties notified each

[1] Redlands Construction Co., Inc.'s name appears as amended at the hearing.

[2] Respondent Felts filed an answer but did not formally appear at the hearing. Its sole owner, Mr. Patrick Felts, was present throughout the proceedings and appeared as a witness.

[3] The General Counsel's unopposed motion to correct certain obvious typographical errors in the transcript is granted.

[4] Respondent Felts ceased doing business on July 1, 1980. The parties stipulated it engaged in commerce within the meaning of the Act during the period April 17, 1979, through July 1, 1980. See further discussion, *infra.*

[5] The first, signed on behalf of S & C Construction Co., Inc., by Joseph P. Cooksey on March 2, 1970 to 1972. The second, signed on behalf of S & C Construction Co., Inc., by Joseph P. Cooksey, President, on December 8, 1972, extended from 1972 to 1975. The third, signed on behalf of S & C Construction Co., Inc., by Joanna E. Felts, secretary-treasurer, on May 29, 1975, extended from 1975 to 1978. The fourth, signed on behalf of Redlands Construction Co. by Partrick Felts on June 15, 1978, extended from 1978 to April 30, 1981.

[6] While not described in the same language, the employees covered by the contracts' terms are those set forth in paragraph VI of the complaint (herein referred to as the unit) which recapitulates the contractual unit description in the nomenclature of the Act.

other that the contract would expire by its terms on April 30, 1981.[7]

There was no direct evidence that the Union at any time represented a majority of employees in the unit. The parties agreed that there had never been a Board representation election or a Colorado state representation election of any type.

b. *Analysis and conclusions; Contentions*

The General Counsel relies on the existence of contracts and the evidence of their application to establish the Union's majority representation of the employees and the appropriateness of the Unit. Respondent Redlands disputes the validity of the contracts. It further argues they do not provide evidence of majority support for the Union at any time.

2. The validity and effect of the contracts and the Union's majority status

Respondent Redlands contests the validity of the various contracts in part by arguing that the General Counsel failed to show the purported signatories on behalf of Respondent Redlands were at any time authorized by it to enter into a collective-bargaining agreement with the Union. At the relevant times signers Cooksey and Joanna Felts were half owners of the corporation and active in its management and Patrick Felts was an active manager. In no instance was the contract attacked during its life by a corporate denial of the signatory agent's obstensible authority. Rather the terms of the contracts were followed as to Respondent Redlands' employees during each contract's term. Without reaching the issue of whether the corporation had given authority to the three individuals to sign the collective-bargaining agreements with the Union, I find that Respondent Redlands held out these individuals at the time they signed the contracts as having the apparent authority to enter into such agreements and that Respondent Redlands may not now effectively deny responsibility for those actions. *The Anaconda Company*, 224 NLRB 1041 (1974). Nor do I find the contention of Respondent Redlands that Mr. Cooksey may have been a member of the Union when he signed the contract relevant. Union membership does not debar an individual from acting as an agent of an employer in entering into a contract with a union concerning employee terms and conditions of employment. Accordingly, I find the contracts were properly executed by agents of Respondent Redlands.

Respondent Redlands asserts that there is no direct evidence that a majority of employees ever selected the Union as their representative.[8] Respondent Redlands is correct that the General Counsel offers no more than the contracts and the evidence of their application noted above to support its assertion of majority support for the Union. The General Counsel argues on brief that Respondent Redlands "having lived by the agreement, it is too late to argue its validity." The case the General Counsel cites for this proposition however is not a construction industry case where the application of Section 8(f) of the Act comes into play.[9]

I view the instant cases as controlled by the Board's recent decision in *Carmichael Construction Company*, 258 NLRB 226 (1981). There the Board held that in construction industry cases successive contracts between an employer and a union do not raise a presumption that a union is the majority representative of the employer's employees. The Board noted further however that in such cases the employer must adduce affirmative evidence to indicate that the union did not enjoy the support of a majority of the employer's employees prior to entrance into the initial agreement or thereafter. Absent such evidence, an employer may not withdraw recognition or refuse to bargain with the union based on a bare assertion that the union had never demonstrated support from a majority of employees.

In the instant case, Respondent Redlands has proved there was no election or other official certification of the Union as the employees' representative. This is not inconsistent with voluntary recognition having been granted based on a demonstration by the Union of majority support among employees. There was no evidence offered of employee support for the Union at the time of the initial contract or at any time thereafter. Respondent Redlands argues that it is the General Counsel who must affirmatively prove union majority support among employees. I disagree based on *Carmichael, supra*. It is true that the General Counsel bears the burden of proof on each and every allegation in the complaint including the allegation that the Union represented a majority of employees in the unit. I find that by proving the existence and application of a consecutive series of contracts over a period of years, where Respondent Redlands has failed to present any evidence that the Union had not obtained or had subsequently lost majority support, the General Counsel has thereby met its burden on the majority question. Accordingly, I find that at all relevant times, the Union has represented a majority of employees in an appropriate unit.[10]

[7] Respondent Redlands in its communication to the Union specifically noted it was not acknowledging the validity of the contract by giving the Union written notification of intention to terminate.

[8] The complaint alleges that the Union has represented a majority of employees in the unit since 1968. The 1970–72 contract is labeled an "initial" contract and there is no suggestion an earlier contract was ever entered into. Thus 1970 is the earliest time the Union may be considered as the employees' representative on this record.

[9] Employers in the construction industry are specifically allowed under Sec. 8(f) of the Act to enter into colleciive-bargaining agreements with labor organizations before a majority of employees have indicated their support of the union.

[10] The contractual unit and its equivalent description as set forth in the complaint are not facially inappropriate under Sec. 9 of the Act. Given the history of bargaining with respect to the unit and the complete absence of any evidence showing it has been or is now an inappropriate unit, I find the General Counsel has sustained its burden of proof with respect to the appropriateness of the unit for purposes of collective bargaining.

3. Respondent Redlands' actions in withdrawing recognition from the Union[11]

a. *Evidence*

There is no dispute that Respondent Redlands followed the terms of the 1978–81 contract until its expiration on May 1, 1981. There is also no dispute that Respondent Redlands rescinded its recognition of the Union as the representative of its employees and refused to meet and bargain with the Union concerning a new contract. As Respondent Redlands noted in its brief:

> Under present conditions, Redlands cannot sign a contract with [the Union] either with or without an all-union shop clause. Economic conditions have changed to the extent that the company can and must conduct its business as an open shop.

On April 16, 1981, Respondent Redlands distributed to unit employees on Respondent Redlands' letterhead the following letter:

April 16, 1981

> For the past three years, we have been observing the provisions of an agreement between a contractors' association and Local Union No. 9 of the International Union of Operating Engineers. Whether this agreement is valid as it affects our company is being litigated before the National Labor Relations Board. In any event, it will expire by its terms on May 1, 1981. Even if all the necessary legal requirements for determination of a bargaining unit and elections for the choice of a bargaining agent and an all-union shop were met, we could not enter into a similar new agreement with the union or renew the present one and still obtain the contracts which are essential to our continuing in business, or being competitive otherwise. We hope that you will stay with us. It is our current plant to maintain a wage scale that will give you a nice take-home pay. If you have any interest at all in staying with us, please see Mr. Herrera as soon as possible.
>
> You have the right to be or to refrain from being a member of a labor organization without any pressure or interference on our part.
>
> Very truly yours,
> Redlands Construction Co. Inc.
> BY
> /s/ Patrick Felts

Not all employees agreed to accept nonunion working conditions. On April 30, 1981, Respondent Redlands issued final checks to unit employees Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson, who did not accept the new terms of employment. There was no evidence that Respondent Redlands at any time rescinded its letter of April 16, 1981, or told employees that contractual benefits would continue to be paid or new rates negotiated after April 30, 1981. On May 1, 1981, without bargaining with the Union, Respondent Redlands instituted new wages and benefits for unit employees which involved, *inter alia*, discontinuing payments to contractually established fringe benefit trusts. Contractual conditions have never been restored to unit employees. The four employees noted *supra* have not returned to Respondent Redlands' employ.

b. *Analysis and conclusions; Contentions*

With respect to this aspect of the case, the General Counsel makes several allegations. First, the General Counsel contends that, by distributing the April 16, 1981, letter to employees, Respondent Redlands violated Section 8(a)(1) of the Act. Second, the General Counsel contends that, by forcing employees to choose between leaving their employment or accepting a nonunion workplace and nonnegotiated terms and conditions of employment, Respondent Redlands constructively discharged employees Mulnix, Thompson, Mease, and Gagnon violating Section 8(a)(3) and (1) of the Act. Third, the General Counsel contends that by withdrawing recognition from, and refusing to meet and bargain with, the Union and by unilaterally changing unit employees' terms and conditions of employment without bargaining with the Union, Respondent Redlands violated Section 8(a)(5) and (1) of the Act. Respondent Redlands denies that it violated the Act.

4. The repudiation of the collective-bargaining relationship and unilateral change in working conditions

I have determined, *supra*, that the Union represented unit employees at all relevant times. Respondent Redlands did not offer any evidence to support a finding that the Union's majority support was ever lost or that Respondent Redlands had a good-faith belief that the Union did not represent a majority of unit employees. Thus there was no proper basis for Respondent Redlands to withdraw recognition of the Union. Accordingly, I find that Respondent by withdrawing recognition from the Union and refusing to meet and bargain with it violated Section 8(a)(5) and (1) of the Act.

Given its continuing collective-bargaining obligation, Respondent Redlands could not change employees' terms and conditions of employment unilaterally even though the contract had expired. *Harold W. Henson d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Accordingly, I fihd that in so doing Respondent Redlands violated Section 8(a)(5) and (1) of the Act. The act of threatening employees with the unjustified and illegal repudiation of the collective-bargaining relationship and the unilateral change of working conditions by means of the April 16, 1981, letter is a violation of Section 8(a)(1) of the Act and I so find.

5. The constructive discharge allegation

Respondent Redlands' primary defenses to the discharge allegations were directed to its asserted right to repudiate the bargaining relationship, i.e., "go open shop," and its claimed right to simultaneously unilateral-

[11] The relationship of Respondent Redlands to Respondent Felts and the allegations concerning Respondent Felts' obligations to the Union are discussed separately, *infra*.

ly change employee terms and conditions of employment. I have rejected those defenses, *supra*. Respondent Redlands makes additional arguments which must be considered.

Respondent Redlands argues that the employees quit their employment and were not discharged as the complaint alleges, thus the complaint does not raise the issue of a constructive discharge. Further, argues Respondent, such a quit is not a discharge and does not violate the Act. The General Counsel disagrees and cites recent cases in support of its argument, including *N.L.R.B.* v. *Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1980), enfg. 239 NLRB 65 (1978), a case in which Respondent Redlands' counsel participated and raised the defenses discussed here. In that case the court, in agreement with the Board, found that an employee who quit rather than work under illegally imposed nonunion conditions was constructively discharged in violation of Section 8(a)(3) of the Act. The court further held that the constructive discharge issue was properly decided even though the complaint did not allege a constructive discharge in those precise terms. Based on that holding and the other cases cited by the General Counsel as well as the fact that the General Counsel's theory of the discharges was made clear in its opening statement and was fully litigated at the hearing, I find that the complaint is sufficient to put the matter in issue before me. I therefore find that Respondent Redlands, when it gave the employees no choice but to quit or accept nonunion conditions, constructively discharged each of the four employees, in violation of Section 8(a)(3) and (1) of the Act.[12]

B. *Respondent Redlands and Respondent Felts as a Single Entity*

1. Evidence

Respondent Felts was incorporated and commenced business in April 1979. It was at all times wholly owned by Patrick Felts. Its $50,000 capitalization came from Respondent Redlands by means of a check drawn on Respondent Redlands' account by Patrick Felts. In April 1979, Respondent Felts contracted to do certain work for Mountain Bell Telephone that had up to that time been performed by Respondent Redlands. Respondent Felts operated only from the facility utilized by Respondent Redlands and leased onsite office and operating equipment from Respondent Redlands.

Respondent Felts utilized the salaried and hourly employees employed by Respondent Redlands. Respondent Redlands continued to do work for Mountain Bell Telephone as a subcontractor to a general contractor of Mountain Bell Telephone who required that "Union" terms and conditions of employment be met by all subcontractors. Respondent Redlands continued during this period to apply the union contract to its unit employees. When these employees were employed by Respondent Felts however they received lower noncontract wages and benefits. Employees were sometimes employed alternatively by one Respondent and then the other. On other occasions employees were paid on a split basis with wage portions allocated between Respondents based on the portion of time spent on behalf of each.

Patrick Felts was the chief executive officer of Respondent Felts and acted in a continuing management capacity for Respondent Redlands by, *inter alia*, signing checks, signing contracts, and advising the owner. Respondent Redlands' superintendent, Gene Rush, had field responsibility for the onsite work and the supervision, hiring, and firing of employees of each Respondent. The employees who worked for both Respondents did the same type of work for each and used similar and in some cases identical equipment in performing their duties.

Mr. Felts and Respondent Redlands reached an agreement to dissolve Respondent Felts in early 1980. Respondent Felts ceased its operations as of June 28, 1980, although it continued to collect accounts payable for a period. Respondents agreed to transfer Respondent Felts' assets, contracts and accounts receivable to Respondent Redlands in exchange for cancellation of the original capitalization loan owed it by Respondent Felts. Respondent Redlands, as part of the absorption of Respondent Felts' operations, assumed the contract between Mountain Bell Telephone and Respondent Felts. While the record is not clear whether Respondent Felts is still in existence—Mr. Felts, its sole owner, evinced uncertainty with respect to the issue—it is not in any practical sense a functioning entity.

2. Analysis and conclusions; Contentions

The General Counsel contends that Respondents are but a single employer. It further contends that the unit employees of both Respondents constitute but a single appropriate bargaining unit which was covered by the contract. Therefore, argues the General Counsel, Respondents improperly withheld contractual terms and conditions of employment from employees during the time they were in Respondent Felts' employ. Respondent Redlands argues initially that no bargaining obligation or contractual commitment with the Union applied to Respondent Redlands and, therefore, no such derivative obligation would lie against Respondent Felts. Second, it argues that Respondents had different stockholders, directors, and officers and that Respondent Felts was formed "as a matter of economic necessity, and for the purpose of obtaining contracts for which Redlands would not have been invited to bid." Thus, it argues, they must be regarded as independent.

Single Employer and Single Unit Issues

The determination of whether two entities should be treated as a single employer involves a consideration of numerous factors and may present difficult questions of fact and the weighing of facts. This is not such a case

[12] Respondent Redlands argues that it clearly informed employees that they were free to be members of the Union and further that it expressed the hope they would remain in its employ. Respondent Redlands misses the point. It is not union membership or a particular quantum of wages and benefits which was denied employees and hence caused their constructive discharge. It was Respondent Redlands' illegal denial of their statutory right to be represented by a labor organization and to enjoy the fruits of that bargaining relationship which is the heart of the matter. To make employees forgo those statutory rights or quit is to constructively discharge any employee who quits in order to preserve his right to be represented by a union.

nor, I believe, do Respondents seriously contest the close relationship between the two entities. Respondents note that there is no evidence of common stockholders, directors, or officers. Patrick Felts, however, during the life of Respondent Felts, continued to act for Respondent Redlands as its agent. Three examples of the close relationships are—(1) the closed corporations were owned by mother and son; (2) Respondent Redlands provided the original capitalization and leased the necessary space, office equipment, and operating equipment to Respondent Felts; and (3) at Respondent Felts' corporate dissolution all assets and operations were absorbed by Respondent Redlands in return for forgiveness of the original loan. These factors point to a conclusion that ownership and control of the two entities were unitary. See, e.g., *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

The two entities had common management in Messrs. Felts and Rush—who controlled labor relations for each entity. Their employees were either shared or alternated between the two. Respondent Felts at its creation took over Redlands' work and returned it to Respondent Redlands when it ceased operations. Equipment, office space, material, customers, all seem to have come from Respondent Redlands, were shared during Respondent Felts' life and then returned to Respondent Redlands at Respondent Felts' passing. Indeed, during its commercial existence Respondent Felts was seemingly but a subdivision of Respondent Redlands which was created in an attempt to avoid the terms and conditions of the collective-bargaining agreement with the Union. Based upon all of the above and the record as a whole I find that Respondents were but a single employer. I also find that the employees of Respondents engaged in unit work constitute a single collective-bargaining unit. Not only was the work and the supervision of the employees identical but the employees themselves were the same.

Conclusion

Given the single employer relationship and the single unit including employees of each Respondent, it follows that the contract applicable to Respondent Redlands' employees also applied to the unit employees of Respondent Felts. *South Prairie Construction* v. *Local No. 627, I.U.O.E.*, 425 U.S. 800 (1976). Respondents therefore, by failing and refusing to apply the terms of the collective-bargaining contract to Respondent Felts' unit employees, violated Section 8(a)(5) and (1) of the Act and I so find.[13]

IV. REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondents have constructively discharged employees Roland Mulnix, Don Thompson, Ernest Mease, and Wade Gagnon because the employees wished to retain their right to be represented by a union, in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondents to offer each of them immediate and full reinstatement to his former position of employment, or, if said positions no longer exist, to substantially equivalent positions, discharging if necessary any replacements hired after the date of discharge. I shall also order that Respondents make each employee whole for any loss of earnings he may have suffered by reason of the discrimination against him—including the remedy afforded other unit employees, see the following paragraph—to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950); see also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondents unilaterally changed working conditions and failed and refused to apply the terms of the 1978–81 collective-bargaining agreement to unit employees of Respondent Felts and to employees of Respondent Redlands after the contracts' expiration, all in violation of Section 8(a)(5) and (1) of the Act, I shall order Respondents to make whole said unit employees by restoration of any loss of wages and benefits they suffered as a result of this discrimination, including the payment of all pension and health and welfare contributions required under the expired contract, which have not been paid and which would have been paid absent Respondents' unlawful conduct found herein, as well as to apply and to continue to apply the contract to unit employees until such time as Respondents negotiate in good faith with the Union to a new agreement or to an impasse. See, e.g., *Crest Beverage Co., Inc.*, 231 NLRB 116 (1977).

Interest on payments to employees shall accrue as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). Interest and other special make-whole requirements with respect to the contractual fringe agreements with respect to the contractual fringe agreements shall be determined

[13] Respondents engaged in settlement efforts with the Union to resolve this aspect of the case. Inasmuch as the General Counsel did not agree or enter into any settlement, no issue of a settlement agreement as a bar to the litigation is before me. Respondent Redlands however sought to introduce evidence of these settlement negotiations. I excluded the proffered evidence pursuant to Rule 408 of the Federal Rules of Evidence. Respondent Redlands on brief argues that its offers to compromise with the union were themselves bargaining sessions and should not have been excluded under Rule 408 because in the instant case Respondents are accused of a failure to bargain regarding the very matters discussed in the rejected evidence. Thus, argues Respondent Redlands, it has been prevented from introducing evidence that it was bargaining with the Union as part of its defense to the failure to bargain allegations. I reject this argument. I asked counsel for Respondent Redlands at the hearing to identify any of the now rejected evidence which included unconditional recognition of the Union as representative of unit employees. None was so identified. I take Respondents' rejected evidence to address an attempt to settle the unfair labor practice charge by liquidating the sums due particular employees coupled with a conditional agreement by Respondents to recognize the Union and the contract, if, and only if, its settlement proffer was accepted by the other litigants as resolving the matter. Conditional to recognize and bargain with a union as representative of employees in this context are not collective bargaining but are no more than settlement negotiations designed to resolve matters in litigation. Therefore such evidence is not relevant to a resolution of the merits of the failure to bargain allegations herein. An offer to recognize and bargain conditioned on settlement of litigation is not true collective bargaining which follows only after unconditional recognition of a union as representative of employees. Thus, the only value of the evidence is to show Respondents made offers to compromise the case. As such this evidence is squarely within the definition in Federal Rules of Evidence, Rule 408, of matters which are not admissible and I reaffirm my ruling to exclude the evidence.

in accordance with *Merryweather Optical Company*, 240 NLRB 1213 (1979).

Having found Respondents have wrongfully withdrawn recognition of the Union as representative of unit employees, I shall require them to restore and reaffirm recognition of and to meet and bargain with the Union, on request, concerning terms and conditions of a new collective-bargaining agreement covering unit employees.

Inasmuch as Respondents' conduct herein constitutes a total rejection of employees' rights to be represented by a Union and includes the constructive discharge of employees who resisted the wrongful withdrawal of recognition of the Union, I find Respondents' conduct goes to the heart of the Act. Accordingly, I shall order Respondents to cease and desist from violating the Act in any other manner. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). I shall also order Respondents to preserve and make available to the Board or its agents, upon request, for inspection and copying, all records necessary to determine the payments necessary under this Decision and to ensure that Respondents have complied with the terms of the Order herein.

Upon the foregoing findings of fact, and the entire record herein, I make the following:

CONCLUSIONS OF LAW

1. Respondent Redlands and Respondent Felts, and each of them, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents are sufficiently related to constitute a single employer for purposes of this Decision.

4. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All equipment operators, mechanics and apprentices employed by Redlands Construction Co., Inc, and Felts Construction Co. at their Grand Junction, Colorado facility, but excluding laborers, office clerical employees, and all guards, professional employees and supervisors as defined in the National Laabor Relations Act.

5. The Union has at all times since 1972 represented a majority of employees in the unit.

6. By informing unit employees that it was going to cease recognizing or withdraw recognition of the Union as representative of unit employees and was going to change employees' terms and conditions of employment without bargaining with the Union, Respondents violated Section 8(a)(1) of the Act.

7. By causing employee Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson to terminate their employment rather than accept loss of their union representation and contractual or negotiated terms and conditions of employment, Respondents constructively discharged these employees in violation of Section 8(a)(3) and (1) of the Act.

8. By engaging in the following acts, Respondents violated Section 8(a)(5) and (1) of the Act:

(a) By failing and refusing to recognize the Union as the representative of Respondent Felts' unit employees.

(b) By failing and refusing to apply the terms and conditions of the applicable collective-bargaining agreement to Respondent Felts' unit employees and unilaterally changing said employees' terms and conditions of employment.

(c) By failing and refusing to continue to recognize and bargain with the Union as the representative of Respondent Redlands' unit employees after the expiration of the contract in 1981.

(d) By failing and refusing to follow the terms and conditions of the expired contract with respect to Respondent Redlands' unit employees and unilaterally changing said employees' terms and conditions of employment.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 9(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondents, Redlands Construction Co. Inc. and Felts Construction Co., as a single employer, jointly and severally, Grand Junction, Colorado, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that they will not recognize or will no longer recognize the Union as representative of employees in the unit.

(b) Withdrawing recognition from the Union as representative of employees in the unit.

(c) Failing and refusing to meet and bargain with the Union regarding terms and conditions of employment of employees in the unit and, if such agreement is reached, embodying such agreement in a new contract.

(d) Changing unit employes' terms and conditions of employment unilaterally following expiration of the collective-bargaining agreement, without affording the Union an opportunity to meet and bargain concerning terms and conditions of employment.

(e) Changing unit employees' terms and conditions of employment during the contract's life by refusing to apply the contract's terms to them thereby breaching and repudiating the collective-bargaining agreement without the approval and consent of the Union.

(f) Constructively discharging employees by forcing them to quit or acquiesce in employment without representation by the Union or the enjoyment of negotiated terms and conditions of employment.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(g) In any other manner violating the terms of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to employees Ronald Mulnix, Ernest Mease, Wade Gagnon, and Don Thompson immediate and full reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired after the date of their unlawful discharges.

(b) Make said employees whole for any loss of wages and other benefits caused by the discrimination against them by paying them an amount equal to what they would have earned from the date of their discharge to the date that they are offered reinstatement. Such backpay and appropriate interest thereon is to be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Make employees in the unit whole for the loss of contract terms and conditions resulting from the wrongful withholding of contract benefits to Respondnt Felts' unit employees and to Respondent Redlands' unit employees after the contract's expiration, and continue to apply the contract's terms to unit employees until such time as Respondents negotiate in good faith with the Union to a new agreement or to an impasse. Such makewhole payments to employees and to appropriate contractual funds, with appropriate interest, shall be computed in accordance with the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to agents of the Board, for examination and copying, all records necessary to analyze the amounts of money due under the terms of this Order and otherwise necessary to ensure that the terms of this Order are complied with.

(e) Post at its facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being after being duly signed by its authorized representative, shall be posted by Redlands Construction Co., Inc. and Felts Construction Co., immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Redlands Construction Co., Inc., and Felts Construction Co. to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Within 20 days from the date of this Order, notify the Regional Director, in writing, what has been done to comply with this Order.

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board." Further, if at the compliance stage of this proceeding it is determined that Respondent Felts is no longer in existence and reference to it in the notice will confuse employees, the Regional Director may delete or amend reference to it as appropriate.